

THE CONFLICT BETWEEN NATIONAL SECURITY AND INDIVIDUAL PRIVACY RIGHTS IN MALAYSIA – WHERE DO THE COURTS STAND?

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ABSTRACT

The existence of sophisticated neo-technologies in this information and communication age provides the Malaysian government a spectrum of measures to ensure security at the national level. These technology-based measures are however also a cause of concern among Malaysians when it comes to individual privacy rights. This paper attempts to conceptualize the divergent notions of privacy and security and to justify the need for these two opposing notions in respect of electronic-based security measures in both public and private premises in Malaysia. In considering these divergent notions, this paper will consider the perception of the courts of Malaysia as well as courts of other developed countries concerning the use of electronic-based measures for ensuring national security and the conflict with individual privacy rights. This study will also provide a solution for the harmonization between the conflicting notions of national security and individual privacy rights.

Keywords: privacy; national security; cyber law; judicial decisions.

1. INTRODUCTION

“...[t]he problem of the safety of the country seems to be no longer one of external safety, but an internal one: the safety of citizens in their everyday life...” (Zedner, 2003; Melossi & Selmini, 2000).

-- Romano Prodi (The Prime Minister of Italy, 1997)

This quote, relating to domestic and national security, reveals that the concept of ‘Security’, more specifically ‘National Security’ does not only mean being secure from external attacks by other countries but also includes security at the internal or domestic level.

Malaysia already has experienced a number of terrorism attacks both internally and externally since her independence in 1957 Hammond (2007). To counter such terrorism attacks, the legislature introduced the Internal Security Act (ISA) 1960 (In Malay: Akta Keselamatan Dalam Negeri) [Malaysia, Act No. 82] which was repealed by the two newly adopted enactments: The Security Offenses (Special Measures) Act (SOSMA) 2012 (In Malay: Akta

Kesalahan Keselamatan (Langkah-Langkah Khas) 2012) [Malaysia, Act No. 747] and the Prevention of Crime (Amendment and Extension) Act (PCA) 2014 [Malaysia, Act No. 297]. Interestingly, these enactments caused some controversy as they were considered to have inhibited some of the constitutional rights of Malaysian citizens, such as: rights to personal liberty and freedom of movement as stated under Articles 5 and 9 of the Federal Constitution of Malaysia (FCM) respectively.

This concern over the conflict between national security and individual privacy rights can also be seen in most of the developed countries around the world. Undoubtedly this signifies that, protection of individual privacy right and related other human rights becomes a challenge to the governments of these countries.

Correspondingly, in the last three decades, many of the western countries have politically realized the importance of national security after having a series of terrorist attacks. In particular, the devastation of the September Eleventh (9/11) incident held in 2001, which was witnessed by the whole world (Zedner, 2003), altered and remodelled the landscape of security measures in both national and transnational levels in the United States of America (the U.S.), as well as other developed countries. Interestingly, this incident substantially reduced the state's need for giving priority to external threats over the need to ensure internal security. Not only that, it also led to the subsequent enactment of the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 (The USA PATRIOT Act 2001) (Solove, 2004; Freedman, 2003). Assuredly, this Act of 2001 opened a new door for the U.S.A. Government as well as its national security agents to create an unprecedented ability and power to introduce modern and up-to-date controls or surveillance of its citizens. Furthermore, this Act allows the government and its security agencies to use electronic devices to spy on its own citizens despite fierce debate over individual privacy rights and freedoms. As stated in Hammond (2007) and Norton-Taylor (2014) literatures, in recognition of the concern over the introduction of such measures, Irene Khan (the Secretary General of Amnesty International) thus rightly pointed out that:

"...[t]he war on terror", far from making the world a safer place, has made it more dangerous by curtailing human rights, undermining the rule of international law and shielding governments from scrutiny...." (p. 270).

2. NOTIONS OF PRIVACY & SECURITY - DIVERGENT VIEWS

The concept of "Security" at both national and international levels is a very tricky matter to define. It is because different people have their own point of views based on their fields of mastery. Thus, Zedner (2003) rightly mentioned that:

"...[S]ecurity is a slippery concept. Its meanings are multiple and without clarity about which meaning is intended (or understood); exactly what is being provided and consumed, sold and bought, promised or sought remains obscure...." (p. 154).

Arnold (1962) also demonstrated the elastic characteristics of the concept of "security" by saying that: "the term 'security' covers a range of goals so wide that highly divergent policies can be interpreted as policies of security" (p. 150). This view had been reflected in the decision of the former Chief Justice of the Australian High Court, Mason J. in *Church of Scientology Inc. vs. Woodward* [1982] 154 C.L.R. 25, wherein he observed:

“...[t]hat security is a concept with a fluctuating content, depending very much on circumstances as they exist from time to time....”.

However, to introduce a commonality to security measures at the national level, Lord Denning explained the function and responsibility of the security service in the United Kingdom (U.K.) by circumscribing the view that national security should be concerned with- “one purpose, and one purpose only, the Defence of the Realm” (Hanks, 1988, p. 118). According to Lord Denning’s proposition, the role of national security in the U.K. was solely confined to protect the Kingdom. Even though, Lord Denning’s view cannot be declared as a complete definition of the term “security”, it nonetheless reveals the role of security at the national level. As mentioned in Hanks (1988) literature, Lord Denning further observed that:

“...The words 'in the interests of national security' are not capable of legal or precise definition. The circumstances are infinite in which the national security may be imperilled, not only by spies in espionage, but in all sorts of indefinite ways....” (p. 119).

A resembling understanding of the concept of security at national level has also been expressed by the Home Secretary of the U.K., Leon Brittan, when introducing the Interception of Communication Bill in 1985. He noted that the term “security”:

“...[i]s widely used elsewhere in the statute book, and . . . encompasses the protection of the country and its institutions from internal and external threats and the security of the realm, for example, from terrorists, espionage or major subversive activity....” (Hanks, 1988, p. 119-120).

Similarly, in Australia, the first Hope Commission of Australia, (The Royal Commission on Intelligence and Security (RCIS) which was established on 21 August 1974, headed by Justice Robert Hope, with an attempt to initiate a comprehensive inquiry into Australia's security services) (Royal Commission on Intelligence and Security, 2015) offered a defensive assertion of the notion of “national security”. In determining its mission, it was stated that: “...[P]rotect and promote Australia's vital interests through the provision of unique foreign intelligence services as directed by Government...”. Interestingly, the Australian approach has been supported and modified by the McDonald Commission of Canada, in determining the concept of the ‘security of Canada’ on the basis of the following two main plinths:

“...[F]irst, the need to protect Canadians and their governments against attempts taken by foreign powers to use coercive or clandestine means to advance their own interests in Canada, and second, the need to protect the essential elements of Canadian democracy against attempts to destroy or subvert them....” (Hanks, 1988, p. 119).

To sum up, it is pertinent to mention that, ‘national security’ both internally and externally has always got the uppermost and unceasing preference by almost all the countries in this world. Furthermore, this has also been reaffirmed by their domestic courts of the concern states. Therefore, in case of any possible ground of emergency or threats that could let the sovereignty or peace and tranquillity of the society become affected, the state authorities (specifically- by law enforcement agents) shall adopt all the necessary measures to protect such possible attacks and ensure national security.

On the other side of the debate, there is another issue which always makes barrier while conforming national security by way of covert monitoring; that is, the ‘right to privacy’.

Interestingly, these two concepts of ‘individual privacy’ and ‘national security’ have been seemingly in hostile relations from long before and become by far gruesome nowadays, owing to the gradual adoption of new technologies by the national security forces in surveillance.

In General, the connotation ‘Privacy’, decidedly becomes tricky for anyone simply to understand what it is meant by and how far it covers. The origin of the word ‘privacy’ is still vague to the majority of the scholars, albeit some exponents opine that, its root is very similar with other words like ‘privation’ and ‘deprivation’, which denotes ‘not to be involved in public matters or episodes’ (Posner, 1979, p. 1). Historically, abundant of privacy-related references from different scriptures, like: The Holy Bible (Hixson, 1987; Moore, 1984), the Holy Quran the Jewish law (Rosen, 2000, p. 16) substantive protection of privacy in primitive Hebrew culture (Hixson, 1987; Moore, 1984), classical Greece and ancient China (Jingchun, 2005) and the Code of Hammurabi all these evidences undoubtedly testify the existence of the concept of privacy in the very early days of the human civilization.

However, the ground breaking piece of research on privacy had been expressed for the first time by two prominent authors named Warren and Brandeis (1890, p. 193) which was later admired by numerous scholars (Gavison, 1992; Harry, 1966; Adams, 1905). Even quite a number of divergent English court decisions have admired this article as one of the momentous and brilliant literature in introducing privacy as a form of right over years. Warren and Brandeis (1890) in their article entitled “The Right to Privacy”, defined privacy as “right to be alone” (p. 193-194). Furthermore, the authors asserted privacy as “right to be alone” wherein ‘right’ they referred to as ‘an individual’s right to decide the limits of communication of his: “thoughts, sentiments, and emotions to others” (p. 200).

Correspondingly, the concept of privacy has also been explained as a form of human dignity by several scholars (Bloustein, 1964; Reiman, 1976). According to Reiman (1976) human dignity is the root on the basis of which an individual’s privacy stands and thereby individual right to privacy safeguards every individual’s interest “in becoming, being and remaining a person” (p. 37). Other jurists like Khan (2003) have linked privacy with the human personality by saying that “autonomy, dignity and integrity” of an individual are depended, influenced and protected by privacy (p. 378). Furthermore, ‘Privacy’ in the form of ‘Secrecy’ has been demonstrated by Posner (1998). He further opined that “concealment of information, is invaded whenever private information is obtained against the wishes of the person to whom the information pertains” (p. 46-47). Thus, in explaining the dogma of Posner (1998), Nurbek (2008) rightly pointed out that, individual’s privacy potentially being affected in such a situation where concealed information become leaked by others without taking consent from that individual subject (p. 39).

The Doctrine of Security in Malaysia

Malaysia, in its twenty-three years of celebrating independence, has also adopted an approach to its national security during the early 1980s, by dint of active efforts of two eminent politicians, Tun Dr. Mahathir and Tun Musa Hitam. A brief discussion on the ideologies of these two prominent politicians are as follows:

From an external or transnational perspective on national security, Tun Musa Hitam (the then Deputy Prime Minister of Malaysia) (Hitam, 1984) expressed his view that, the concept of “security” had to be understood under the rubric of Malaysia’s doctrine of “comprehensive security” (p. 94-99). Furthermore, Tun Musa Hitam’s view may be considered as the first

outline of the concept of “security” in Malaysia. Actually, his assertion was made on the basis of three mutually reinforcing pillars of “comprehensive security” which embrace firstly, “a secure Southeast Asia”, secondly, “a strong and effective ASEAN community” and thirdly, “the principle of non-intervention and the building of a structure of trust, confidence and goodwill between the ASEAN states” (Hitam, 1984, p. 94-99). In fact, this compact notion of comprehensive security expressed an idea of conforming security by building a friendly relation among the neighbouring states and thus assuring better environment for effective state governance without interference externally.

In contrast, Tun Dr. Mahathir (the former Prime Minister of Malaysia) (1986), in attending the opening ceremony of the First Institute of Strategic and International Studies (ISIS) Conference On National Security on July 15, 1986 in Kuala Lumpur, offered the concept of national security from an internal or domestic perspective. According to Tun Mahathir:

“...When we talk about national security, the picture that usually comes to mind is that of armed soldiers manning border posts or fighting in the jungle... But security is not just a matter of military capability. National Security is inseparable from political stability, economic success and social harmony. Without these all the guns in the world cannot prevent a country from being overcome by its enemies, whose ambition can be fulfilled sometimes without firing a single shot...” (Capie & Evans, 2007, p. 69).

Based on the above-mentioned two prominent politicians’ viewpoint on the notion of ‘Security’ in Malaysia, it can be recapitulated that like other countries around the world, Malaysia has also had to grapple with and develop its own understanding of “security”. Dr. Noordin Sopiee, developed the unique doctrine of “national resilience” in Malaysia by expounding further on the notion of “comprehensive security”. Furthermore, he described “the strengthening of national unity”, “inter-ethnic harmony”, “social cohesion”, “political solidarity” and “nationalism” as the indispensable components of “national resilience” or “the bedrock of Malaysia’s doctrine of comprehensive defence” (Sopiee, 1984, p. 4).

3. CONFLICTS BETWEEN NATIONAL SECURITY AND PRIVACY RIGHTS UNDER THE DOMESTIC COURT OF MALAYSIA

3.1 Implication of Privacy Rights in The Courts

Forthrightly speaking, the provision of ‘right to privacy’ has neither been inserted directly under the Federal Constitution of Malaysia (FCM); nor has it any separate legislation in Malaysia. However, it does not mean that the FCM is reluctant to recognize the importance of privacy rights for its citizens. Furthermore, it can instead be interpreted as a subset to a stupendous fundamental right (Zulhuda, 2013). More specifically, the ‘right to life and liberty’ and ‘freedom of movement’ which have been inserted under Articles 5 and 9 of the FCM respectively, could have similar values of right to privacy in Malaysia. In fact, this kind of constitutional provisions have already got similar values of right to privacy in many other countries (Khan, 2015). To illustrate this, in India, the right to life and liberty as stated under Art. 21 of the Constitution of India (Bharatiya Samvidhaan) 1949, has taken into account as similar effect for the ‘right to privacy’ of every individual and this had been proven in the case of *Kharak Singh vs. State of Uttar Pradesh* [1963] AIR SC 1295, where the learned Judge Subba Rao opined that:

“...If physical restraints on a person’s movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man’s physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions to encroachments are directly imposed or indirectly brought about by calculated measures....”

Moreover, this notion of right to privacy has got further constitutional recognition under the rubric of right to life and liberty in the cases of *Gobind vs. State of Madhya Pradesh* [1975] AIR SC 1378 and *R. Rajagopal vs. State of Tamil Nadu* [1995] AIR SC 264. Furthermore, in the case of *R. Rajagopal* (1995) where the Supreme Court Judge, B.P. Jeevan Reddy held that certain privacy related rights such as ‘individual privacy rights’, ‘privacy of his family’, ‘child bearing’, ‘marriage’, ‘procreation’, ‘motherhood and education’ should be ensured and the violation of these rights could be claimed under Art. 21 of the Constitution of India 1949. In addition, in *Gobind* (1975) case the learned judge of the Supreme Court Mathew, J. Implicitly accepts the existence of privacy rights guaranteed under the rubric of Art. 21 of the Constitution of India.

Some jurists, like Ram (2007) have argued that, this principle should also be applied in elucidating the Malaysian Constitution. Interestingly, this idea has already been reflected impliedly in the recent case of *Sivarasa Rasiah vs. Badan Peguam Malaysia & Anor* [2010] 2 MLJ 115, whereby the learned judge refused to explain the notion of “right to personal liberty” as mentioned in Art. 5 of the FCM in a narrow and restricted point of view. This court decision undoubtedly signifies that, other rights such as privacy rights could be encompassed under this Art. 5 (Khan, 2015, p. 101).

Correspondingly, the recent case-development of Malaysian judiciary show a pragmatic approach of upholding privacy rights of individual citizens both in local judiciary and legislative spheres. Even though the attitudes of the court of Malaysia in the past decade showed a clear ignorance in recognizing the privacy rights of an individual which had been reflected in the cases of *Ultra Dimension Sdn. Bhd. vs. Kook Wei Kuan* [2004] 5 CLJ 285, HC and *Dr. Bernadine Malini Martin vs. MPH Magazines Sdn. Bhd. & Ors.* [2006] 7 MLJ 561 (which was appealed in [2010] 5 MLJ 755), the trend has been changed providentially in the recent cases where the courts have started to recolonize the invasion of privacy rights. More evidently, in the case of *Lew Cher Phow @ Lew Cha Paw & Ors vs. Pua Yong Yong & Anor* [2011] MLJU 1195, where the Plaintiff’s petition to solicit interlocutory injunction over fitting of CCTV cameras looking onto, by neighbour by claiming the violation of privacy right and the judge Vernon Ong citing that, there was an overt and impertinent surveillance done by the defendant which caused an unwarranted violation of the plaintiff’s privacy right (Zulhuda, 2013, p. 464). Furthermore, in giving guideline for the prospective of right to privacy, his Lordship states in this *Lew Cher Phow* case (2011) as:

“...Indeed, the categories of such rights are not closed and may expand with new emerging trends and changing social conditions. The courts and legislature have from time to time responded to this change in times by extending the boundaries of right and liability in tort and other areas of law. This Court is in accord with the emerging trend of giving recognition to the

right to privacy. Therefore, if there is a right under the law there must be a remedy for its violation even if the injury does not cause any actual or pecuniary damage....”

Other related salient cases such as *Maslinda bt Ishak vs. Mohd Tahir bin Osman & Ors.* [2009] 6 MLJ 826; *Lee Ewe Poh vs. Dr Lim Teik Man & Anor.* [2011] 1 MLJ 835 and *Sherinna Nur Elena bt Abdullah vs. Kent Well Edar S/B* [2011] MLJU 150, whereby the legal position of right to privacy has become stronger.

3.2 Implication of National Security in the Courts

Since the adoption of the ISA, the courts in Malaysia have unceasingly shown a very supportive attitude to the steps or measures taken by executive bodies when it came to the issue of “national security”. In other words, the support of the courts has been evident in several cases where the constitutional rights of citizens have been compromised. In particular, the courts have allowed the curtailment of civil liberties (as stated under Arts. 5 to 13 of the FCM) of citizens by security measures such as arrests or detentions. This had been evident in the case of *Teh Cheng Poh vs. Public Prosecutor* [1979] 1 MLJ 50, whereby the Federal Court of Malaysia upheld laws based on Articles 149 and 150 of the FCM. Indeed, this was incongruous or irreconcilable with other provisions of the FCM relating to civil liberties, more specifically, provisions under Part II of the FCM. Thus, Lord Diplock in the case of *Teh Cheng Poh vs. Public Prosecutor* [1979] 1 MLJ 50, PC at 54, gave a milestone judgement by stating the jurisdictional application of Article 150 as:

“... The purpose of the Article is to enable Parliament, once subversion of any of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence. Where such an Act of Parliament confers powers on the Executive to act in a manner inconsistent with Article 5, 9 or 10, the action must be taken bona fide for the purpose of stopping or preventing subversive action of the kind referred to in the recitals to the Act, for the order to be valid under Article 150(1) the provision of the Act which confers the power must be designed to stop or prevent that subversive action and not to achieve some different end....”

Interestingly, this judicial dictum had also been reiterated and supported by other court decisions. Therefore, by accepting the argument of Parliamentary power to enact laws which infringe or compromise the fundamental liberties of citizens, the courts have therefore refused to accept the concept of individual privacy rights of the citizens of Malaysia as contained in the fundamental liberties enshrined in Articles 5 to 13 of the FCM. However, this judgment has also been criticized by a number of contemporary court decisions.

Despite the criticisms, the courts have continued to support the view that Parliament may enact laws against individual rights in the interest of national security. The recent case of *Nik Adli bin Nik Abdul Aziz vs. Ketua Polis Negara* [2001] 4 MLJ 598 (Malay High Court 2001) [hereinafter Adli (1)] could be the best example in this regard, where ten supporters of the Pan-Malaysian Islamic Party (PAS), including four youth leaders, were detained by law enforcement agents under the ISA in the year 2001. One of the detainees, Nik Adli bin Nik Abdul Aziz (the appellant), claimed his release in a habeas corpus application in the High Court by challenging his detention order made under section 73 (Soon, 2015). The court rejected this application in the grounds that, firstly: the law enforcement agents or the authorities had duly informed the applicants about the grounds under which they have been arrested; secondly: the applicant’s

detention order that had been made under section 73 of the Internal Security Act (ISA) 1960 (Act No. 82) had been subsequently converted to a section 8 of the ISA 1960 detention and thirdly: the applicant failed to rebut the assumption that a person detained under section 73 was in lawful custody. Interestingly, the detention order for the applicant and other detainees was further extended for another two years by the Minister (under sec. 8 of the ISA), which was also being challenged in the High Court and the Federal Court correspondingly. However, in both the cases, the Courts upheld the decision of the Minister by dismissing the applications in the ground of national security.

Another similar example is the case of *Nasharuddin bin Nasir vs. Kerajaan Malaysia & Ors.* [2002] 6 MLJ 65, 68 (Malay. High Court 2002). In this case, Nasir was suspected of having connections with a suspected terrorist organisation the KMM, and arrested thereafter on 17 April 2002. In the initial High Court hearing, the judge, Suriadi J. upheld the habeas corpus application. However, the decision was set aside on appeal to the Federal Court, whereby the learned judge validated the Minister's decision to detain the Respondent (Hammond, 2007, p. 287). Moreover, in concluding remarks of the case of *Kerajaan Malaysia, Menteri Dalam Negeri, and Ketua Polis Negara vs. Nasharuddin Bein Nasir* [2003] No. 05-75-2002(B) (Malay, Federal Court of Appeal 2003), Chief Justice Shim, Federal Court Judge, clarified the stand of the court on decisions taken by the executive concerning matters of national security as follows: "...In matters of preventive detention relating to national security, the Judges are the executive...."

This attitude of non-hindrance of the courts against the decisions taken by the executive is reflected in the following contemporary cases, *Abdul Razak Bin Baharudin & Ors. vs. Ketua Polis Negara & Ors.* [2004] 7 MLJ 267 and *Ahmad Yani Bin Ismail & Anor vs. Inspector General of Police & Ors.* [2005] 4 MLJ 636. In both the cases, the court showed a clear reluctance or unwillingness to uphold the habeas corpus applications against detention by the executive in the interest of national security. Thus, in refusing intervention on the issue of national security in cases involving judicial review of executive action, the Federal Court has held that:

"...It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive, involving as they invariably do, policy considerations and the like...." (*Kerajaan Malaysia, Menteri Dalam Negeri, and Ketua Polis Negara vs. Nasharuddin Bein Nasir* [2003]).

4. NATIONAL SECURITY AND INTERNATIONAL COURTS

If we appraise the attitude of courts in different countries, we can glean that in many cases, the courts have refused to favour the claims of individuals or groups against the government in the ground of national security. In the U.K. case of *Council of Civil Service Unions vs. Minister for Civil Service* [1985] AC 374 could be an appropriate example in this regard. In this case, the then Prime Minister of the United Kingdom, Margaret Hilda Thatcher, banned all the Government Communications Headquarters (GCHQ) employees to be the member of the trade union in the ground of national security. In spite of an extensive publicity campaign and expostulation demonstrated by trade unions, the government denied to reverse its decision. Even the House of the Lords (specifically: Lords Fraser, Scarman and Diplock) declined to uphold the legitimate demand of a trade union as it might be detrimental to national security.

An important approach was established from this case whereby the absolute power of the judiciary to decide and take judicial action shifted to the executive (or government) in ensuring the security of the nation. In the decision it was noted that:

“...National security is the responsibility of the executive government; what action is needed to protect its interests is ... a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves...”

The non-justiciability of executive action in the interest of national security can also be seen in the case of *R vs. Secretary of State for the Home Department, ex parte Hosenball* [1977] 1 W.L.R. 766 [1977] 3 All E.R. 452, where the Appellate Division Judge Lord Denning Mr. held that: “...The balance between [national security and individual freedom] is not for a court of law. It is for the Home Secretary....”.

Similarly, national security has been the top priority in the U.S. which is evident in the case of *Haig vs. Agee* 453 U.S. 280 (1981). In this case, the Supreme Court of America asserted that certain legal and constitutional rights and privileges of the individual such as the freedom of speech, the right to due process and a citizen’s right to go abroad, can be curtailed in the interest of national security. The court further asserted in the case of *Haig vs. Agee* 453 U.S. 280 (1981) at 307 that: “...[I]t was obvious and unarguable that no governmental interest is more compelling than the security of the Nation....”

Likewise, the Federal Court of Canada has adopted a similar approach while considering national security issues. This was reflected in the judgment of the two leading Canadian cases: *Re Goguen and Albert and Gibson* [1984] 7 D.L.R. (4th) 144 and *Re Kevork and The Queen* [1984] 17 C.C.C. (3d) 426, where there were conflicting claims of the privilege of the Crown (under section 36 of the Canada Evidence Act, 1970) and public interest. The Canadian courts upheld crown privilege in respect of national interest and in one decision noted that, “...[T]here can be no public interest more fundamental than national security....”.

Therefore, in all the cases cited above, the issue of “security” matters at national level has always been accorded the highest primacy both in Malaysia and abroad. Moreover, the governments of these countries have been judicially allowed to take the necessary steps in the interest of national security, even though executive action may compromise certain fundamental and constitutional rights of the citizens.

5. CONCLUSION AND POLICY RECOMMENDATION

Based on the above discussion, it can be determined that “security”, more specifically at the national level, has traditionally been given an uncontested preference over individual rights in most of the developed countries in the world, in general and in Malaysia, in particular. Moreover, the analysis clearly shows that the fundamental and constitutional rights of the individual can be suspended temporarily and, more worryingly, arbitrarily, owing to the demands of national security. Due to the primacy of national security interests, we can see how individual privacy rights, developed on the basis of human dignity, have been trampled upon or curtailed to the extent that individuals have been deprived of their rights to lead normal lives without State intervention.

Malaysia has adopted a number of legislative instruments like the Computer Crimes Act 1997, the Security Offences (Special Measures) Act (SOSMA) 2012 (In Malay: *Akta Kesalahan Keselamatan (Langkah-Langkah Khas)* 2012) [Malaysia, Act No. 747] and the Prevention of Crime (Amendment and Extension) Act (PCA) 2014 [Malaysia, Act No. 297] as measures for the effective protection of national security in the real and virtual world. Thus it would seem that Malaysia has also followed other countries in establishing a trend of ensuring national security by overruling individual privacy rights despite some recent exceptional cases. Therefore, it is pertinent to propose the following recommendations for harmonizing between two battling notions of ‘national security’ and ‘individual privacy rights’ in Malaysia which reads-

First and foremost, it has to be pointed out that unnecessary collection of any information over an individual by the Government Security Agency or by any other public or private authority can contravene individual’s privacy right. To illustrate, for one to open a bank account, it is rational for the bank authority to ask the name, personal addresses and the marital status of its present or prospective clients. However, it is (to a certain extent) irrational to query further about the employment descriptions or criminal records or physical conditions of clients because it does not really have any practical effect to the bank authority for opening an account for its clients in the bank, unless there is a clear justification under certain statutes.

Secondly, sometimes it has been precedent in some developed countries that, the investigating officers are given absolute power to track, monitor and retain the suspected criminals’ movements. These kinds of provisions have also been seen under Sec. 7 and schedule II (form of electronic monitoring device) of the Security Offences (Special Measures) Act 2012. As it is a reality that, any kind of uncontrolled power could lead the officers to abuse hence, there should be a clear guideline on how these will be monitored so that the purpose of putting this electronic device could be achieved without violating the individual privacy rights for Malaysian citizens.

Thirdly, it is also seen in some developed countries that, the investigating or police officer would generally collect all the vigilant video footage or information and submit the investigated report to the public prosecutor. It is however noted that, there is no such provision to ensure the confidentiality of this personal information that is mentioned in the report. This is also true in Malaysia by virtue of Sec. 4 (9) of the Security Offences (Special Measures) Act 2012. Therefore, some certainty in this aspect is warranted because the officer deals with data in electronic form, which is more prone to leak, disclosure or security threats. Therefore, there should be further guideline in ensuring the data security of such report.

Lastly, an individual enactment to be known as “*Privacy Act*” should be adopted in Malaysia under which individual privacy rights should be shielded. This kind of legislation has already been adopted by a number of countries like: *Privacy Amendment (Private Sector) Act 2000* (Act No. 155) in Australia; *Privacy Act* (R.S.C., 1985, c. P-21) in Canada; *Privacy Act 1993* (Public Act 1993 No 28) in New Zealand and *The Privacy Act of 1974* (5 U.S.C. § 552a) in the United States and so on. Even though, Malaysia has already adopted *Personal Data Protection Act 2010* (Act 709), it mostly regulates the processing of personal data in regards to commercial transactions. Undoubtedly, this enactment could not fulfil the demand of individual privacy rights for the citizen of Malaysia wholeheartedly. Therefore, there is a dearth of having an individual instrument for the protection of privacy rights in Malaysia.

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